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in the

Supreme Court

of the

United States

OCTOBER TERM

No. 574

UNITED BONDING INSURANCE COMPANY,
Petitioner,

vs.

DEVELOPMENT CORPORATION OF AMERICA INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ERIK J. BLOMQVIST, JR., ESQ.
Attorney for Petitioner
UNITED BONDING
INSURANCE COMPANY
101 Biscayne Building
19 West Flagler
Miami, Florida 33130

WILLIAM T. MOORE
Attorney for Petitioner
UNITED BONDING
INSURANCE COMPANY
810 Biscayne Building
19 West Flagler
Miami, Florida 33130

Of Counsel
WICKER, SMITH, PYSZKA,
BLOMQVIST & DAVANT
1017 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

MOORE, WELBAUM, ZOOK
& JONES
810 Biscayne Building
19 West Flagler
Miami, Florida 33130

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TO: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, UNITED BONDING INSURANCE COMPANY, makes this its Petition for a Writ of Certiorari to the United States Court of Appeals, for the Fifth Circuit, and in support thereof would show:

REFERENCE TO OPINIONS BELOW

By this petition, Petitioner seeks a review of a decision of the United States Court of Appeals, Fifth Circuit. The opinion of the Court is appended to this petition as Appendix A. The opinion is unreported as of this writing.

STATEMENT OF JURISDICTIONAL GROUNDS

1. Judgment affirming the judgment of the District Court for the Southern District of Florida was entered June 25, 1969, by the United States Court of Appeals for the Fifth Circuit.

2. On July 30, 1969, the United States Court of Appeals, Fifth Circuit, denied UNITED BONDING INSURANCE COMPANY'S petition for rehearing.

3. Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254 (1).

ISSUES PRESENTED FOR REVIEW

1. Under the law of the State of Florida, may an obligee under a contractor's surety bond recover from a surety for breach of a contract different from the contract referred to and incorporated into the bond?

2. The Court erred in failing to apply the law of the State of Florida as enunciated by the Supreme Court of Florida in the cases of *Booske v. Gulf Ice Co.*, 24 Fla. 550, 5 So. 247, (Fla. 1888); *Sewell v. Huffstetler*, 83 Fla. 629, 93 So. 162 (Fla. 1922).

STATEMENT OF THE CASE

Jurisdiction in the District Court for the Southern District of Florida was predicated upon Title 28 U.S.C. § 1332.

Respondent, DEVELOPMENT CORPORATION OF AMERICA, INC., sued the Petitioner, UNITED BONDING INSURANCE COMPANY, as surety for International Electrical Contractors, Inc. (hereinafter called "International"), for damages suffered for an alleged breach of contract.

Petitioner, UNITED BONDING INSURANCE COMPANY, in its amended answer denied liability alleging that it did not bond the contract sued upon.

The case was tried without a jury. A final judgment was entered in favor of DEVELOPMENT CORPORATION OF AMERICA, INC.. UNITED BONDING INSURANCE COMPANY timely filed its motion for a new trial and its motion to amend the findings of fact. The Court entered an order partially amending the findings of fact and denying the motion for new trial. Notice of appeal was timely filed.

The Court of Appeals, Fifth Circuit, affirmed; a copy of the opinion appearing as Appendix A attached to this petition.

In 1964, DEVELOPMENT CORPORATION OF AMERICA, INC. became the general contractor for the construction of the Hollywood Towers Apartment, Hollywood, Florida. In pursuance of its contract, DEVELOP-

MENT CORPORATION OF AMERICA, INC. entered into negotiations for the furnishing and installation of the electrical work for the Hollywood Towers. In August, 1964, DEVELOPMENT CORPORATION OF AMERICA, INC. forwarded to International an unsigned purchase order agreement bearing the date August 10, 1964, (Pl. Ex. 2, Trial Exhibits). This contract was never signed by either DEVELOPMENT CORPORATION OF AMERICA, INC. or International.

On September 1, 1964, UNITED BONDING INSURANCE COMPANY signed a sub-contract bond CB-2563 in the amount of $210,000.00 with International, as principal, and DEVELOPMENT CORPORATION OF AMERICA, INC., as obligee, conditioned to a contract between DEVELOPMENT CORPORATION OF AMERICA, INC. and International dated the ____ day of August, 1964, which contract was referred to and incorporated into the bond (Pl. Ex. 6, Trial Exhibits).

Subsequently, on September 28, 1964, DEVELOPMENT CORPORATION OF AMERICA, INC. and International executed a contract. This September 28, 1964, contract (Pl. Ex. 5, Trial Exhibits) was the agreement whereby International carried on its work for the furnishing and installing the electrical work on Hollywood Towers; the September 28, 1964, contract being the only contract ever executed between DEVELOPMENT CORPORATION OF AMERICA and International.

In January, 1965, International allegedly defaulted on its contract.

Suit was brought by DEVELOPMENT CORPORATION OF AMERICA, INC. against UNITED BONDING INSURANCE COMPANY on bond CB-2563. UNITED BONDING INSURANCE COMPANY in its amended answer denied execution of the bond itself and in the alternative denied any liability under the bond since the bond No. CB-2563, issued September 1, 1964, was conditioned to a contract of August, 1964, and the damages DEVELOPMENT CORPORATION OF AMERICA, INC. sought, resulted from default on the part of International of a contract between International and DEVELOPMENT CORPORATION OF AMERICA, INC. dated September 28, 1964.

At trial, over objection of UNITED BONDING INSURANCE COMPANY, the Court received into evidence the contract dated September 28, 1964, and a xeroxed copy of UNITED BONDING INSURANCE COMPANY'S bond CB-2563 securing an August, 1964 contract.

At no time during the proceedings did DEVELOPMENT CORPORATION OF AMERICA, INC., by its pleading or testimony, seek to reform either the contract dated September 28, 1964, or the bond of UNITED BONDING INSURANCE COMPANY, dated September 1, 1964, purporting to secure a contract of August, 1964.

The Trial Court, in its amended findings of fact, found that UNITED BONDING INSURANCE COMPANY was paid a premium for writing the bond, but that this premium "was placed in escrow as a setoff against the sums due UNITED BONDING INSURANCE COMPANY by International Electrical Contractors, Inc." (App. 45, R. 865)

Upon appeal, the Court of Appeals, Fifth Circuit, affirmed the decision of the District Court and in so doing recognized the controlling Florida law enunciated by the Supreme Court of Florida in *Booske v. Gulf Ice Co.*, 24 Fla. 550, 5 So. 247, 250 (Fla. 1888):

> "a plea which sets up a contract different from and contradictory to the statements in the bond is bad, and may be taken advantage of on demurrer. It is a common rule, well established, that, in an action on a bond between the parties thereto, they are controlled by the recitals therein with reference to which the contract is made."

This principle was reaffirmed by the Supreme Court of Florida in the case of *Sewell v. Huffstetler*, 83 Fla. 629, 93 So. 162 (Fla. 1922).

The Court of Appeals, after reciting the rule as enunciated in *Booske v. Gulf Ice Co.*, supra., found that the rule was not applicable to the case under appeal, on the grounds that UNITED BONDING INSURANCE COMPANY had received and kept the money bargained for, i.e. the premium.

In so holding, the Court of Appeals overlooked the fact that the District Court in its amended findings of fact (App. 45, R. 865) held that the premium received by UNITED BONDING INSURANCE COMPANY from its principal International was placed in escrow as a setoff to cover money due UNITED BONDING INSURANCE COMPANY from International. The money due to UNITED BONDING INSURANCE COMPANY by International represents claims paid by UNITED BONDING INSURANCE COMPANY on other bonded jobs wherein International was principal and UNITED BONDING INSURANCE COMPANY was surety.

In its petition for rehearing, UNITED BONDING INSURANCE COMPANY brought to the attention of the Court of Appeals that the factual basis, (that UNITED BONDING INSURANCE COMPANY received and retained the premium) upon which the Court of Appeals declined to apply the law of the State of Florida, was erroneous and contrary to the facts recited in the District Court's amended findings of fact. UNITED BONDING INSURANCE COMPANY in its petition for rehearing urged that, based upon the facts set forth in the District Court's findings of fact, and amended findings of fact, the Court of Appeals was obligated to apply the law of the State of Florida and reverse the decision.

The Court of Appeals denied UNITED BONDING INSURANCE COMPANY'S petition for rehearing without opinion.

ARGUMENT

Based upon the facts of the case as enunciated by the District Court in its findings of fact, and amended findings of fact, the decision of the Court of Appeals, Fifth Circuit, is clearly erroneous.

It is clear that Respondent, DEVELOPMENT CORPORATION OF AMERICA, INC., sought to recover, and did recover a judgment from UNITED BONDING INSURANCE COMPANY, the surety, for breach of a contract which UNITED BONDING INSURANCE COMPANY did not bond. DEVELOPMENT CORPORATION OF AMERICA, INC. brought its action for damages resulting from a breach of a contract dated September 28,

1964. UNITED BONDING INSURANCE COMPANY'S bond signed September 1, 1964, secured a contract of a ____ day in August, 1964. The contract upon which DEVELOPMENT CORPORATION OF AMERICA, INC. bases its cause of action was not even executed until 27 days after the signing of UNITED BONDING INSURANCE COMPANY'S bond.

This case, being a suit on a sub-contract bond, is governed by the law of the State of Florida; and under Florida law, one who seeks to recover upon a contractor's bond for breach of a contract different from the contract referred to and incorporated into the bond has no cause of action.[1]

The Court of Appeals, Fifth Circuit, was clearly in error in its failure to apply the law of Florida, and reverse the case.

It is vitally important that this Honorable Court exercise its discretion and review the decision of the United States Court of Appeals, Fifth Circuit.

The law as enunciated by the Court of Appeals is clearly in error and contrary to the controlling decisions of the Supreme Court of the State of Florida. The decision, sought to be reviewed by this Honorable Court, has rewritten the basic surety law that a surety bond secures only the contract specifically referred to and incorporated into the bond. This decision will unfairly prejudice other surety companies doing business in the State of Florida, as well as the other states.

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[1] *Booske v. Gulf Ice Co.*, supra. See also *Sewell v. Huffstetler*, supra.

The Court of Appeals by its decision has clearly refused to apply the law of the State of Florida. The Federal Appellate Courts do not possess this discretion. The Court, in its failure to apply the applicable Florida Law, has violated the principle set down by this Honorable Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938).

In addition, the decision of the Court of Appeals, if not corrected, will make a suit on a contractor's bond more attractive in the Federal Courts (when jurisdiction is obtainable) than in the State Courts of Florida.

It is respectfully requested that this Honorable Court grant certiorari to review the decision of the United States Court of Appeals, Fifth Circuit.

Respectfully submitted,

Erik J. Blomqvist, Jr.

ERIK J. BLOMQVIST, JR., ESQ.
Attorney for Petitioner
UNITED BONDING
INSURANCE COMPANY
1017 Biscayne Building
19 West Flagler
Miami, Florida 33130

Of Counsel

WICKER, SMITH, PYSZKA, BLOMQVIST,
& DAVANT
1017 Biscayne Building
19 West Flagler
Miami, Florida 33130

WILLIAM T. MOORE

WILLIAM T. MOORE
Attorney for Petitioner
UNITED BONDING
INSURANCE COMPANY
810 Biscayne Building
19 West Flagler
Miami, Florida 33130

Of Counsel

MOORE, WELBAUM, ZOOK & JONES
810 Biscayne Building
19 West Flagler
Miami, Florida 33130